No. 11002

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PEOPLES BANK,

Appellant,

vs.

FEDERAL RESERVE BANK OF SAN FRANCISCO and HENRY F. GRADY, Federal Reserve Agent,

Appellees,

and

FEDERAL RESERVE BANK OF SAN FRANCISCO,

Appellant,

vs.

PEOPLES BANK,

Appellee.

MEMORANDUM IN OPPOSITION TO THE MOTION OF THE FEDERAL RESERVE BANK AND OF HENRY F. GRADY TO DISMISS THE APPEAL OF THE PEOPLES BANK.

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INDEX.

Table of Authorities Cited.

Authorities.

Rules of Civil Practice:

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MEMORANDUM IN OPPOSITION TO THE MOTION OF THE FEDERAL RESERVE BANK AND OF HENRY F. GRADY TO DISMISS THE APPEAL OF THE PEOPLES BANK.

We respectfully submit that this motion is without merit—either in law or in justice. In law, the appeal complies with the statute and with the rules. Under the statute—the appeal was timely and it was taken from a final judgment. Under the rules, as we shall show—the notice of appeal was directed to the proper order of the District Court to be appealed from. *In our opinion, there does not exist even a technical defect justifying this motion.*

In Summary, an order dismissing a complaint is a final order from which an appeal may be taken (Point V). There

are at least three (and possibly four) such orders (Point I): (1) the order contained in the Opinion, filed November 17, 1944; (2) the Order on Motions, filed November 17, 1944 (the clerical omission in this order of the words "the complaint is dismissed" is of no consequence (Point VI)); (3) possibly, Nos. (1) and (2) taken together as constituting the order of November 17, 1944; and (4) the so-called judgment of January 8, 1945. It is clear that this last order is repetitious surplusage (Points I and II); and was so regarded by all parties (Point III). By its notice of appeal the plaintiff expressly appealed from an order granting the motion to dismiss the complaint and dismissing the complaint. Plaintiff further described the order as being "the order dated the 17th day of November, 1944". The plaintiff made a correct selection, but even if the plaintiff made an incorrect selection and should have selected the so-called judgment of January 8, 1945 as being the order embodying the final decision from which it clearly and expressly appealed, the reference to the wrong order is of no consequence (Point IV). The appeal is still good.

As to the justice of the motion, we will make no comment. The motion takes one back to the practice before the present rules, when taking an appeal was a kind of tricky game, under which on occasion more attention was paid to form than to substance. It is noteworthy, however, that in this Court, so far as we have been able to ascertain, no appellant has finally lost his right to have the merits of his case considered by this Court, through any purely unsubstantial technical defect in a timely notice of appeal which fully informed the appellee of what the appeal was about.

In the light of the decision of this Court in the recent case of *Crosby* v. *Pacific Lines,* 133 F. (2d) 470, it would seem unnecessary to brief or argue a motion to dismiss an appeal of so little substance. The matter, however, is of such great importance to the appellant, that we have felt it incumbent upon us to present the Court with an extended discussion of the law and the facts.

Statement of Facts.

In opposition to the motion of the Federal Reserve Bank (hereinafter sometimes referred to as the Reserve Bank), and to the similar motion of Henry F. Grady, the appellant, Peoples Bank, relies upon the Transcript of Record on Appeal in this case as supplemented by the order of the District Court of April 26, 1945, the affidavit of Kenneth M. Johnson, verified May 21, 1945 and the affidavit of Carl M. Owen, verified May 15, 1945, filed herein.

By its complaint (R., p. 3), the appellant, Peoples Bank, sought a declaratory judgment against the Federal Reserve Bank of San Francisco, as principal defendant, and Henry F. Grady, as Federal Reserve Agent, declaring that a certain condition attached to the stock of the Peoples Bank in the Reserve Bank was invalid. The defendants moved to dismiss the complaint (R., p. 12).

On November 17th, 1944, Hon. Michael J. Roche, United States District Judge who heard the case, filed his Opinion (R., p. 149). This Opinion concluded as follows (R., p. 165):

> "4. The motions to dismiss filed by each of the defendants will be granted.
>
> "* * * *Therefore, this complaint is dismissed* as to all defendants for lack of jurisdiction of this Court.
>
> "*An order* will be entered *in accordance with this opinion*" (R., p. 165). (Italics in this brief ours unless otherwise noted.)

It is noteworthy that the Court directed that "*an order*"—not a judgment—should be entered. Nor did the Court say an order *and* a judgment.

On the very same day, November 17th, 1944, there was filed an order of the District Court which was entitled "Order on Motions", reading in part as follows:

> "Each of the motions to dismiss and the motion of the defendant Federal Reserve Bank of San Francisco to strike plaintiff's motion for summary judgment are therefore granted * * *" (R., p. 148).

By obvious error of *omission,* this Order on Motions did not go on to say, "and the complaint is dismissed".

No right was given to the plaintiff, by this order, to plead again. The order was final.

This order said nothing about any subsequent judgment to be entered either in the same or different terms. Nevertheless, on January 8th, 1945, the so-called "judgment" in this case was entered. This judgment was prepared by counsel for the Reserve Bank, and approved as to form by counsel for appellant. It directed for the third time what had already been directed twice before.

Thereafter on January 15th, 1945, the appellant, Peoples Bank, filed its notice of appeal, reading in part as follows:

> "Notice is hereby given, that the Peoples Bank, plaintiff above named, hereby appeals * * * from that part of the order of the above entitled Court, Hon. Michael J. Roche, Judge Presiding, dated the 17th day of November, 1944, * * * which (a) grants the motion of defendant Federal Reserve Bank to dismiss and (b) grants the motion of defendant Henry F. Grady to dismiss and (c) dismisses said action as against said defendant" (R., p. 165).

On January 18th, 1945, the appellant, Peoples Bank, filed its statement of points upon which the appellant intends to rely (R., p. 166). These points go to the very meat of the whole controversy.

On January 18th, 1945, the appellant filed its designation of the portions of the record to be contained in the Record on Appeal. This designation included the Opinion and the Order on Motions of November 17, 1944. It did not include the so-called judgment.

On January 26th, 1945, appellee Henry F. Grady filed a designation of additional portions of the record to be included in the Record on Appeal (R., p. 169). *He did not designate the judgment.*

On February 3rd, 1945, the Federal Reserve Bank filed its notice of appeal in which it "hereby appeals and cross-appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that part of the *Order* of the above

entitled Court, Hon. Michael J. Roche, Judge presiding, dated the 17th day of November, 1944, and entered in the above cause, which denies the motion of the defendant Federal Reserve Bank of San Francisco for Summary Judgment'' (R., p. 171).

On February 5th, 1945, the Federal Reserve Bank filed its statement of points on which it intended to rely on its cross-appeal (R., p. 172).

On February 5th, 1945, the defendant Federal Reserve Bank filed its designation of the portion of the record to be contained in the record on appeal on its cross-appeal (R., pp. 172, 173, 175). *It did not designate the judgment.*

Subsequently, on February 6th, 1945, the Federal Reserve Bank of San Francisco filed an amended designation of additional portions of the record to be included in the Record on Appeal (R., pp. 176, 177). *Again, it did not designate the judgment.*

On March 7, 1945, Mr. Agnew, counsel for the Federal Reserve Bank, wrote to Mr. Owen, of counsel for the appellant, Peoples Bank, suggesting, in the interest of reducing the number of briefs on the appeal and cross appeal from a possible six to four, that the appellee's reply brief to the appellant's main brief should also include the appellee's main brief on his cross-appeal. On March 21, 1945, Mr. Owen replied to this letter, accepting the suggestion (Affidavit of Owen).

On April 20, 1945, the appellants served their notice of the motion now before this Court to dismiss the appeal of the Peoples Bank.

On April 26, 1945, attention of counsel for the Peoples Bank having been drawn to the fact that the ''Order on Motions''of the District Court entered on November 17th, 1944, was not in ''accordance'' with the directions of the Court's Opinion, as the Court had directed that it should be, in that the order failed to include the words ''and the complaint is dismissed'', made a motion under Rule 60(a) to have the obvious ''omission'' corrected so as to bring the order in ''accordance'' with the opinion of the Court.

Under date of April 26, 1945, an order of the District Court was entered herein denying this motion.

By the said order of April 26, 1945, the said order and the so-called judgment of January 8, 1945 were added to the record on appeal, and, accordingly, are now before this Court.

Appellant's main brief on the merits, on which a great deal of time and effort had been spent, was in print when the motion to dismiss this appeal was noticed; accordingly, it has been filed and served.

POINT I.

Upon the dismissal of a complaint, the rules of civil practice contemplate only the entry of judgment by the clerk following the direction of the court, which direction may be, and generally is, as in the instant case, included in the opinion.

(*a*) *Under the rules, the opinion of the District Court itself constituted an order which, when entered, could be appealed from.*

Rule 54 provides as follows:

> "*Definition: Form.* 'Judgment' as used in these rules includes a decree and any order from which an appeal lies".

Rule 41(b) of the Rules of Civil Practice provides as follows:

> "*Involuntary Dismissal: Effect Thereof.* * * * Unless the Court in its *order* for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for a lack of jurisdiction or for improper venue, operates as an adjudication upon the merits".

In *Jefferson Electric Company* v. *Sola Electric Co.*, 122 F. (2d) 124 (C. C. A. 7th, 1941) which involved a motion

to dismiss an appeal from an order dismissing a counterclaim, the Court held that "the effect of this rule" [Rule 41(b)] "is to render a dismissal of the counterclaim an adjudication on the merits appealable if at all, like any other final order * * *".

Rule 58, entitled "Entry of Judgment" provides:

> "* * * *When the Court directs the entry of a judgment* that a party recover only money or costs or *that there be no recovery, the Clerk shall enter judgment forthwith upon receipt by him of the direction;* but when the Court directs entry of a judgment for other relief, the Judge shall promptly settle or approve the form of the judgment and direct that it be entered by the Clerk".

In the instant case, in conformity with Rule 58, the District Court in its opinion expressly directed the entry of a judgment ("order"—see Rule 54) in "accordance with this Opinion" which, in itself, directs that the motion of the defendants to dismiss the complaint should be granted and that "this complaint *is* dismissed". Based upon this, the correct procedure under the rules would have been for the clerk to "enter judgment forthwith" without more. *Not even the "Order on Motions" of November 17th, 1944 was required.*

Further, the so-called judgment of January 8th, 1945 clearly is surplusage (see Point II, *infra*).

In *Western Union Telegraph Company* v. *Dismang,* 106 F. (2d) 362 (C. C. A. 10th, 1939), on a motion to set aside a verdict for the plaintiff, the Court wrote an opinion, the closing sentence of which read: "Therefore, the verdict is set aside and judgment entered for the defendant". The opinion was filed in the cause, and the Clerk, pursuant to the direction of the Court contained in its opinion, entered the following order on the docket:

> "Enter order motion of defendant for directed verdict sustained. Verdict of jury set aside and judgment entered for the defendant" (105 F. (2d) 362, at 363).

The Court, after referring to Rule 58 of the Rules of Civil Practice, held that a final judgment had been made and entered, saying:

> "The judgment is the pronouncement of the court from the bench. The clerk's entry is not the judgment, but merely the formal evidence thereof. Under the new rules, it is not necessary for the court to sign a formal written judgment. The entry is made by the clerk in the performance of a ministerial duty."

In *Milton* v. *United States,* 120 F. (2d) 794 (C. C. A. 5th, 1941), *supra,* the appeal was taken from an order denying a motion for a new trial and the defendant moved to dismiss the appeal. The Court disregarded the motion to dismiss the appeal and proceeded to decide the case on the merits, saying: (120 F. (2d) 794 at 795).

> "The overruling of a motion for a new trial is not a final judgment within the meaning of Judicial Code 128, fixing our appellate jurisdiction in cases of this kind. On the other hand, there could be no doubt the verdict of the jury and the overruling of the motion for a new trial together constitute a final determination of the merits of the case. *It does not appear the judge gave any directions in regard to the entering of the judgment.* Other than that, there was nothing further for the judge to do. Under the provisions of Rule 58, Rules of Civil Procedure, 28 U. S. C. A. following section 723c it was the duty of the clerk to enter judgment upon the verdict. This should have been done promptly after the motion for new trial was overruled. Apparently, *the clerk did not do so. The rules of civil procedure were adopted to abolish technicalities and to expedite the due administration of justice. A complete record, including all the evidence, is before us.* We have carefully examined that record and find no reversible error. If appellant had appealed as from final judgment before the clerk entered the judgment it would have been premature but that would not have required the dismissal of the appeal. See *Luckenbach S. S. Co.* v. *United States, supra. That appellant has mistakenly appealed from the order overruling the mo-*

> *tion for a new trial in this case may be considered purely a technicality.* In the interests of justice and to avoid prolonging the litigation for no good purpose, without intending to create a precedent, we consider we may disregard the motion to dismiss the appeal and decide the case on the merits."

In *Zadig* v. *Aetna Insurance Co.*, 42 F. (2d) 142 (C. C. A. 2nd 1930) the Court held that an order dismissing a cause without prejudice because no action had been taken by the plaintiff for one year was a final judgment, although not entered, saying:

> "* * * it makes no difference what the court's determination be called so that it actually disposes of the suit and leaves nothing further to be done. Nor does the lack of entry affect the validity of the judgment * * *. * * * The only act of the court being the rendering of the judgment, in this case evidenced by a written 'order', entry is merely a ministerial duty of the clerk to perpetuate that act, though in most jurisdictions necessary to create a lien or start running the time to appeal" (42 F. (2d) 142, at 143).

In the instant case, the District Court, in its opinion filed on November 17, 1944, actually dismissed the complaint as to all defendants. That direction was an order. Appellant's notice of appeal refers to "The order of November 17th, 1944". That constitutes a proper reference to the directions in the opinion, as constituting an order, as well as to the so-called "Order on Motions".

(b) *At least, the order in the Opinion and the order in the so-called "Order on Motions", both made and filed on the same date, and being supplementary, one to the other, constitute together one order, to wit, "the order of November 17, 1944".*

In *Gulf Refining Co.* v. *U. S.*, 269 U. S. 125 at 135, 1925, the Court said:

> "The government first contends that the decrees are not final and that the appeal should be dismissed because the Court of Appeals remanded the cases

> 'for further proceedings not inconsistent with the opinion of this Court' * * * but the *direction to proceed consistently with the opinion of the Court has the effect of making the opinion a part of the mandate, as though it had therein been set out at length. Metropolitan Company* v. *Kaw Valley District,* 223 U. S. 519, 523. * * * The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value * * *. There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit.''

In *Shannon* v. *Retail Clerks International P. Assn.,* 128 F. (2d) 553 (C. C. A. 7th, 1942), two orders had been entered, one dated October 21, 1941, the other dated October 24, 1941. In phraseology at least, the October 24th order did not appear to be a modification of the earlier October 21st order. The notice of appeal referred to an ''order dated October 20th'', there being no such order. The Court sustained the appeal, saying, among other things:

> ''The failure to correctly describe the order from which the appeal is taken, must be viewed in the light of the fact that although there were seemingly two separate orders, it would be better to describe them as one order, which was modified in part. On this record we would hardly be justified in dismissing the appeal because an erroneous date of the order is given in the notice of appeal'' (128 F. (2d) 553 at 555).

We have no doubt that if the plaintiff in the instant case had not served his notice of appeal until, say, 80 days after the entry of the so-called judgment of January 8, 1945 and had directed his notice of appeal to that judgment, the Reserve Bank would then have moved to dismiss the appeal on the ground that the plaintiff had selected the wrong order to appeal from and that the time for appeal from the order

of November 17, 1944 had passed, the Reserve Bank then relying on the *Western Union* case, *supra, Milton* v. *United States, supra,* and *Sosa* v. *Royal Bank,* 124 Fed. 2d 955 *infra.* Clearly, the time within which notice of appeal must be given, which is statutory, and the failure to comply with which is fatal, was not extended in the instant case by the fact that the so-called judgment was not entered until January 8, 1945, approximately two months after the entry of the Court's Opinion and of the Order on Motions.

POINT II.

The so-called judgment of January 8, 1945 is mere repetitious surplusage not contemplated by the present rules of civil practice.

There was no direction in the Opinion for the so-called judgment. There was no direction in the Order on Motions for the so-called judgment. It is clearly not contemplated by the rules. And all the parties treated it as surplusage (Point III).

It is obvious on the face of the rules that they do not contemplate any such additional document as the so-called judgment. In fact the rules do not contemplate any document at all to be signed by the Court following its opinion. Rule 58 provides that "When the court directs the entry of a judgment that * * * *there be no recovery,* the Clerk shall enter judgment forthwith upon receipt by him of the direction * * *." The notation of a judgment in the civil docket as provided by rule 79(a) constitutes the entry of the judgment.

As above stated, the direction of the District Court in its Opinion in the instant case that "an order will be entered in accordance with this opinion" was a sufficient direction under Rule 58 for the Clerk to enter judgment accordingly in his docket—without more. Consequently, the so-called judgment is clearly repetitious surplusage, not called for by, or in harmony with, the rules. *It was quite properly disregarded by all the parties hereto.*

In *Sosa* v. *Royal Bank of Canada,* 134 F. (2d) 955 (C. C. A. 1st, 1943), a second judgment practically in the language of the first order was held to be "merely a reiteration" and it was held that the appeal was properly taken from the prior order. True it is that in that case the order contained the words "the complaint * * * is hereby dismissed". The Circuit Court of Appeals in that case said: "But for that fact the order *probably* would not have been appealable". It does not categorically commit itself on this position. But in the *Sosa* case, the opinion of the Court was apparently embodied in the order, whereas in our case, in the Court's separate opinion is clearly found the order that "the complaint is dismissed".

The so-called judgment of January 8th, 1945 is identical in its directions with the Order on Motions of November 17th, 1944, except that it contains a final paragraph reading: "It is accordingly Ordered, Adjudged and Decreed that this cause be and hereby is dismissed at plaintiff's cost."

The fact that "the order of November 17th, 1944" did not award costs and that the judgment of January 8th, 1945 did award costs does not deprive the prior order of November 17th, 1944 either as contained in the opinion or in the Order on Motions of its character as a final order. So decided in *Johnson* v. *Wilson,* 118 F. (2d) 557 (C. C. A. 9th, 1941).

POINT III.

In accordance with the contemplation of the rules, although the so-called judgment had already been entered, both appellant and appellees chose "the order of November 17, 1944" as the order which they designated in their respective notices of appeal and cross appeal as constituting the *final* decree and cooperated in the perfection of the Record on Appeal on that basis.

Whether, in referring in their respective notices of appeal and in their other papers, to the "order of November 17, 1944", the parties were referring to the order contained in the District Court's opinion, filed on November 17th, 1944, or to the "Order on Motions" filed on the same date, or to the combination of both of them, does not appear—*except* that the appellant Peoples Bank did in its notice, appeal from that part of the order which "(c) dismisses said action as against the said defendant", there being such an order in the Opinion and no such order expressly contained, in those words, in the Order on Motions.

It is clear that all the parties hereto treated what they referred to as "the order of November 17th, 1944" as a final order having the intent and effect of dismissing the complaint and cooperated in the perfection of an appeal therefrom. All the parties also acted in accord in treating the so-called "judgment" of January 8th, 1945 as mere surplusage.

(a) The District Court clearly indicated, we submit, that the order which was entered by it on its Opinion, was to be the final order. The Opinion stated three things categorically (R., p. 165):

> 1. "The motions to dismiss * * * will be granted".
>
> 2. "This complaint *is* dismissed as to all defendants * * *".
>
> 3. "An order will be entered in accordance with this opinion".

The order entered was entitled "Order on Motions" and stated "Each of the motions to dismiss * * * are therefore granted" (R., p. 148). Nothing is stated in this order or in the opinion about any subsequent judgment to be entered thereon.

(b) The appellant, Peoples Bank, although it filed its notice of appeal after the entry of the so-called judgment, directed its notice of appeal only to what it described therein as "the order of November 17, 1944," and made designations to the record only with respect to such an order. The appellant did not designate the so-called judgment as part of the record. The appellant clearly understood that "the order of November 17, 1944" was a final and effective order. It treated the so-called judgment as repetitious surplusage.

(c) Examining the conduct of the Reserve Bank, it is to be noted that the Reserve Bank is both an appellee and a cross-appellant. It appears that although the judgment, prepared by its counsel, was entered on January 8th, 1945, nevertheless, the appeal and *cross-appeal* which the Reserve Bank subsequently took on February 3, 1945 was an appeal from what it referred to in its notice of appeal as "the order of November 17, 1944." The Reserve Bank took no cross-appeal from the judgment. Neither did it in its designation of what was to be included in the record, *on the Peoples Bank appeal,* which was filed by it on January 26th, 1945, designate the judgment. Nor did the Reserve Bank in its designation of the matters to be contained in the record *on its own cross-appeal,* which was filed February 5th, 1945, designate the judgment, nor did it designate the judgment in its amended designation of matters to be included in the Record on Appeal which it filed February 6th, 1945. The Reserve Bank cooperated in every way with the plaintiff in getting up the Record on Appeal, and a record on its own cross-appeal, and in thereafter arranging for the manner of exchanging briefs, on the basis that "the order of November 17, 1944" was the final order to be appealed from, and that the so-called judgment was a superfluous repetition.

We must assume that the cross-appeal of the Reserve Bank from the denial of its motion for a summary judgment was taken in good faith and with an intent to be pressed. We must further assume, and we do assume, that the selection by the Reserve Bank of what its notice of cross appeal referred to as "the order of November 17, 1944" as the action of the District Court to be cross-appealed from, instead of the judgment of January 8th, 1945, which was prepared and entered by it, was a well considered selection, made in good faith and not designed to entice the appellant into a technical trap, such as it now asserts has caught the appellants.

(d) The conduct of the appellee-cross-appellant, Henry F. Grady was in exact accord with the conduct of the Reserve Bank, and consequently need not be set forth in detail.

In summary, therefore, it is clear from the conduct of the parties that they were in accord in considering what they all referred to as "the order of November 17, 1944" as the final appealable order, and cooperated, on that basis, in the preparation of the appeal papers and in the briefing of the case. Both parties treated the judgment of January 8th, 1945 as a mere repetition. See *Sosa* v. *Royal Bank of Canada,* 134 F. (2d) 955 (C. C. A. 1st, 1943) *supra. Crump* v. *Hill,* 104 F. (2d) 36 (C. C. A. 5th, 1939) *infra.*

POINT IV.

Whatever constitutes the order of the District Court dismissing the complaint, the notice of appeal filed by the appellant is a satisfactory notice of appeal therefrom.

An appeal is taken by filing a notice of appeal (Rule 73(a)).

Rule 73(b) provides that "the notice of appeal * * * shall designate the judgment or part thereof appealed from". This, of course, has to be construed in the light

of Rule 1, which reads that "they (these rules) shall be construed to secure the just, speedy and inexpensive determination of every action".

The judgment in the instant case, from which the appellant appeals, is the judgment granting the motion to dismiss and dismissing the complaint. The notice of appeal expressly designates that judgment as being the judgment appealed from.

The notice of appeal states that appellant "hereby appeals * * * from that part of the order of the above entitled Court * * * dated the 17th day of November, 1944 * * * which (a) grants the motion of the defendant Federal Reserve Bank of San Francisco to dismiss, and (b) grants the motion of the defendant Henry F. Grady to dismiss and (c) dismisses said action as against said defendant".

In the view of the Reserve Bank, as shown by its memorandum on this motion, the vital and the only appealable judgment of the District Court is not the judgment "which granted the motion to dismiss," but the repetitious judgment that "the complaint is dismissed". *That judgment was appealed from in exact words.* And that judgment was expressly included in the Opinion of November 17, 1945. But, says the Reserve Bank, the Peoples Bank made the great blunder of referring in its notice of appeal to an order of November 17, 1944 when it should have referred to a duplicate order of January 8, 1945; and, so says the Reserve Bank, that was fatal.

It is noteworthy however that Rule 73(b) does not require that the notice of appeal shall *give the date* of the judgment appealed from. The notice must designate the "judgment" appealed from, viz., *what was adjudged or ordered,* not the date thereof, and the rule has been so uniformly construed in all the cases in which this question has arisen. If the judgment appealed from is designated in the notice with sufficient definiteness to inform the appellee as to the substance of what is appealed from, the date referred to is of no consequence—even if it be an erroneous date, or a date which refers to a non-appealable order, or a date of a non-existent order.

The authorities establish the following propositions, among others:

1. That if the judgment of the Court, to wit, its pronouncement or direction, is sufficiently designated, it is not at all necessary in the notice of appeal to give the date thereof (*Crump* v. *Hill,* 104 F. (2d) 36, *infra* (in that case there was no notice of appeal at all); *Crosby* v. *Pacific Lines,* 133 F. (2d) 470, and other cases, Hughes, Federal Practice, Vol. 19, p. 48).

2. That if there is a final order from which an appeal could have been taken, and it is reasonably clear that the judgment contained in this final order is what the appellant is attacking on his appeal, the appeal will not be dismissed even though the notice of appeal specifically refers by date and description to a non-appealable order, or even to a non-existent order. (*Safeway Stores* v. *Coe,* 136 F. (2d) 771; *U. S.* v. *Ellicott,* 223 U. S. 524, 539; *Milton* v. *U. S.,* 120 F. (2d) 794; *Shannon* v. *Retail Clerks International P. Assn.,* 128 F. (2d) 553 (in this last case there was no such order in existence as the one designated in the notice of appeal)).

This is the type of situation which the Reserve Bank asserts in its motion exists in this case. We have demonstrated, we believe, that such is not the case, but even if it were, the appeal, under the authorities, would not be dismissed.

3. Rather than have an appellant lose his appeal, where there is a record before the Court on which the merits can be decided, the appeal will not be dismissed, although the appeal is clearly taken from a non-appealable order, and there does not even exist any order or judgment from which an appeal could be taken (*Crosby* v. *Pacific Lines,* 133 F. (2d) 470, *supra; Milton* v. *U. S.,* 120 F. (2d) 794, *supra*).

In *Martin* v. *Clarke,* 105 F. (2d) 685 (C. C. A. 7th, 1939), the Court, after quoting Rule 73(b) said: "The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a par-

ticular case; if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment. Secs. 472, 473, 3 A. M. Jur., pp. 168 and 169. Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal."

In that case, the error in the notice was an error in referring to an order which found the issues for the defendant, whereas the judgment of the Court was in fact in favor of the plaintiff.

(1) *Cases in which the notice of appeal did not designate the judgment appealed from by any date.*

In *Crosby* v. *Pacific Lines, supra,* there was no order granting a motion to dismiss, no order dismissing the complaint and no notice of appeal from any such non-existent order, and of course, *no designated date in the notice of the non-existent order appealed from,* and yet this Court held that the appeal would not be dismissed.

See also,

Crump v. *Hill,* 104 F. (2d) 36, *infra.*

(2) *Cases in which the notice of appeal specifically referred to a non-appealable order, there being an existing appealable order.*

In *Safeway Stores* v. *Coe,* 136 F. (2d) 771 (Court of Appeals of the District of Columbia, 1943), the action came before the appellate court on a motion to dismiss the appeal, in a case which came before the District Court on a motion to dismiss the complaint. The motion to dismiss the complaint was sustained and the complaint was dismissed on October 17th, 1941. Thereafter, the plaintiff

filed a motion for a rehearing which was denied on January 17th, 1942. On February 14th, 1942, the plaintiff gave notice of appeal which stated that it "hereby appeals from the judgment of this Court entered on 17th day of January, 1942"—that being the date of the order of denial of the motion for a rehearing. The Court said (136 F. (2d) 771, at 773):

> "But the order of that date was one denying a motion for rehearing, and it is settled that no appeal lies from such an order. * * *
>
> "However, treating the appeal as one from the dismissal order of October 17, 1941, as we may, United States *v.* Ellicott, 223 U. S. 524, 539, 32 Sup. Ct. 334, 56 L. Ed. 535, the question presented is whether the filing and consideration of the motion for rehearing suspended the running of time for appeal. If it did, the appeal was timely and the motion to dismiss should be overruled."

The Court held that the motion for a rehearing did not suspend the time, and consequently that the appeal was not timely. There is a very interesting dissenting opinion by Associate Justice Miller on the main question.

In *U. S.* v. *Ellicott,* 223 U. S. 524, the judgment against the defendant was entered on May 8, 1908. Subsequently a motion for a new trial was entered which was overruled on January 4, 1909. On February 25, 1909, the defendant gave notice of appeal "from the judgment rendered in the above entitled cause on the 4th day of January, 1909". One of the grounds of the motion to dismiss in the Supreme Court was that the appeal taken was from the judgment of January 4, 1909, which "was merely from the order overruling the motion for a new trial"—clearly a non-appealable order. Nevertheless, the Supreme Court held that the motion to dismiss the appeal was "without merit" (223 U. S. 524 at 539).

In *Milton* v. *U. S.,* 120 F. (2d) 794 (C. C. A. 5th, 1941) *supra,* the notice of appeal gave notice of an appeal from an order denying a motion for a new trial, obviously a non-appealable order. And in that case, no judgment had

actually been entered by the clerk and there had not even been any direction from the Court for the entry of a judgment. Nevertheless, the Circuit Court of Appeals did not dismiss the appeal, but treated it as if it were an appeal from the judgment which should have been entered saying:

> "That the appellant has mistakenly appealed from the order overruling the motion for a new trial in this case may be considered purely a technicality" (120 F. (2d) 794 at 796).

In *Shannon* v. *Retail Clerks International P. Assn.*, 128 F. (2d) 553 (C. C. A. 7th, 1942), *supra,* the District Court made two so-called restraining orders, one dated October 21st, 1941, and the other dated October 24th, 1941. As the Court said (128 F. (2d) 553 at 554):

> "The appeal was taken from an order allegedly dated October 20th. As there is no order of that date in the record, and as there were two orders, one, October 24th, modifying, in part at least, the order of October 21st, we are at a loss to know what order is assailed."

The Court went on to say (128 F. (2d) 553 at 555):

> "The failure to correctly describe the order from which the appeal is taken, must be viewed in the light of the fact that although there were seemingly two separate orders, it would be better to describe them as one order, which was modified in part. On this record we would hardly be justified in dismissing the appeal *because an erroneous date of the order is given in the notice of appeal.* The decision of this court in Rardin *v.* Messick, 7 Cir., 78 F. (2d) 643, justifies us in holding that plaintiffs were appealing from the order of October 21st, as modified by the order of October 24th, which order was the only one entered by the court in this cause."

In *Johnson* v. *Wilson,* 118 F. (2d) 557 (C. C. A. 9th 1941), *supra,* this Court took cognizance of a notice of appeal that was not in the record at all, not having been

designated therefor by either party, but which had in fact been filed and was timely.

(3) In *Crosby* v. *Pacific Lines, supra,* and *Milton* v. *U. S. supra,* the notice of appeal designated a non-appealable order and there was not in existence any appealable order from which an appeal could be taken.

In summary,

1. Viewed as a notice of appeal from the order of November 17, 1944 contained in the opinion, the notice given herein is a complete compliance with the rules.

2. Viewed as a notice of appeal from the Order on Motions of November 17, 1944, it likewise is a complete compliance with the rules, with the date given and with additional language designed to leave this highly critical appellee in no doubt whatsoever that the appellant viewed the complaint as being dismissed, and that the appellant was appealing from that judgment of the District Court.

3. If the order in the Opinion, and the Order on Motions, both dated November 17, 1944, are to be taken together as supplementary parts of one order and as thus constituting the judgment of the District Court, then likewise the notice of appeal is a complete compliance with the rules.

4. If, however, contrary to our view, it should be deemed that the so-called judgment of January 8, 1945, is the only order of the Court which dismisses the complaint, and from which the plaintiff can appeal, then, under the authorities above cited, even in that case, the notice of appeal (which was filed subsequent to the entry of the so-called judgment and was timely, both with respect to the order of November 17, 1944 and to the so-called judgment) is adequate and the appeal will not be dismissed.

It is therefore clear, that, in any event, this appeal was properly taken.

POINT V.

An order dismissing a complaint is a final judgment from which an appeal may be taken.

In view of the provisions of the Rules of Civil Procedure quoted above, there would seem to be no question on this point. However, since the Reserve Bank bases its motion on some of the cases hereinafter analyzed, we feel compelled to discuss them.

A.

The decisions of this Court.

It has been squarely held by this Court in the recent case of *Crosby* v. *Pacific Lines,* 133 F. (2d) 470, (1943) that an appeal may be taken from an "order" dismissing a complaint (a petition in that case). In that case there was, in fact, not even any order granting a motion to dismiss, nor any order dismissing the complaint, nevertheless, this Court upheld the propriety of the appeal on the ground that the "intent to dismiss was clear". In the instant case, the intent to dismiss was clearly expressed by the Court in a categorical statement that "the complaint *is* dismissed."

From our search, there appear to be seven decisions of this Court that have a direct bearing upon the matter, which we list in the order of their decision:

1. *City and County of San Francisco* v. *McLaughlin,* 9 F. (2d) 390, decided in 1925;
2. *Johnson* v. *Horton,* 63 F. (2d) 950, decided in 1933;
3. *Continental National Bank* v. *National City Bank,* 69 F. (2d) 312, decided in 1934;
4. *Hicks* v. *Bekins Moving & Storage Co.,* 115 F. (2d) 406, decided in 1940;
5. *Wright* v. *Gibson,* 128 F. (2d) 865, decided in 1942;

6. *Monarch Brewing Company* v. *George J. Meyer,* 130 F. (2d) 582, decided in 1942;
7. *Crosby* v. *Pacific Lines,* 133 F. (2d) 470, decided in 1943.

The Reserve Bank, on this motion, relies on cases numbered 1, 3, 5, and 6, above listed. Counsel for the Reserve Bank, in their brief, did not cite *Johnson* v. *Horton,* No. 2, above, nor *Hicks* v. *Bekins Moving & Storage Co.,* No. 4 above, nor *Crosby* v. *Pacific Lines,* No. 7 above.

Coming now to a consideration of the rule established by these cases.

(1) The principal authority upon which the Reserve Bank relies is *City and County of San Francisco* v. *McLaughlin,* 9 F. (2d) 390. We respectfully submit that this case is not in point. This case was decided at a time when the old rules were in effect. The present rules were designed, among other things, to abolish the technicalities of the old procedure. Further, the Court's determination did not result in the plaintiff's being thrown entirely out of court. The Court held that the action was still pending.

As was pointed out by the Circuit Court of Appeals for the Second Circuit in *Zadig* v. *Aetna Insurance Company,* 42 F. (2d) 142, 143 (C. C. A., 1930), *City and County of San Francisco* was a case of "order for judgment", whereas, in the instant case, the Opinion and the Order on Motions (to quote the *Zadig* case) "assumed finally to dispose of the cause *ex proprio vigori*" and "contemplated no further action".

(2) *Johnson* v. *Horton,* 63 F. (2d) 950, at 952. This case squarely decided that an order dismissing a complaint is a final order from which an appeal may be taken.

(3) *Continental National Bank* v. *National City Bank,* 62 F. (2d) 312, at 317, is we submit, not in point at all. The case did not involve any question as to whether an order dismissing a complaint was an appealable order or not.

(4) *Hicks* v. *Bekins Moving and Storage Company,* 115 F. (2d) 406 (1940). This case involved, among other things, the appealability of an order dismissing a case for lack of prosecution entered by the District Court on its own motion. This Court, on appeal, held that: "An order of dismissal is a final judgment from which an appeal will lie".

(5) *Wright* v. *Gibson,* 128 F. (2d) 865, C. C. A. 9th, 1942. In that case, following the language upon which the counsel for the Reserve Bank relies and quotes in his memo of points, this Court said:

> "In this case, there was no motion to dismiss the action and, of course no order granting such a motion, nor any judgment dismissing the action. The action is still pending in the District Court."

To contrast *Wright* v. *Gibson* with the instant case, we paraphrase the language of the Court in the *Wright* case just quoted, as follows: "*In the instant case,* there *was* a motion to dismiss the action, and there was an order granting such a motion, and there was an express direction of the Court dismissing the action. In the instant case, the action is no longer pending in the District Court." This Court, in the *Wright* case, cited *City and County of San Francisco* v. *McLaughlin, supra,* as authority. It did not refer to *Johnson* v. *Horton,* 63 F. (2d) 950, *supra,* and *Hicks* v. *Bekins, etc.,* 115 F. (2d) 406, *supra.* Apparently they were not called to the attention of the Court. They were too dissimilar.

(6) In *Monarch Brewing Company* v. *George J. Meyer Mfg.,* 130 F. (2d) 582, 1942, the defendant made a motion for a summary judgment. Thereafter, the District Court made an order granting the motion, and subsequently entered a judgment that the plaintiff take nothing by its action against the defendant. The plaintiff did not appeal from the original order, but did appeal from the subsequent judgment. The Court held that the appeal was properly taken, inasmuch as on the record the Court felt satisfied

that the original order was not intended to be and was understood by the parties as not intended to be considered as constituting the rendition of a judgment in favor of the defendant. The Court cites *City and County of San Francisco* and *Wright* v. *Gibson,* but does not cite *Johnson* v. *Horton* or *Hicks* v. *Bekins, etc.* The Court in the *Monarch* case was clearly justified, in view of the peculiar language of the order in holding that it was not intended by the Court nor understood by the parties to be its final order. In the instant case, however, the language of the Opinion, which in plain terms dismisses the complaint, the character of the Order on Motions, and the conduct of the parties shows an entirely different point of view with respect to the Courts orders of November 17th, 1944. The statement of the Court that an order granting a motion to dismiss cannot be appealed from is, we submit, not authority for dismissing an appeal where, as in the instant case, the Opinion expressly dismissed the complaint. The actual decision of the Court was that the appeal taken was a proper appeal.

(7) *Crosby* v. *Pacific Lines,* 133 F. (2d) 470. That case arose on a petition of the appellant for the allowance of a commission. The matter went to a Special Master, who found that the appellant did not produce the prospective purchaser and he "recommended dismissal of appellant's petition". The order of the Court below from which an appeal was taken "Ordered that the objections to the certificate and report of the Special Master * * * are overruled, and the Certificate and Report of the Special Master is approved".

The Court said (133 F. (2d) 470, at 473):

> "Technically speaking, the appeal herein is invalid because there was no order dismissing the petition. However, the intent to dismiss is clear. Under such circumstances we treat the order above recited as one containing an error 'arising from oversight or omission' within the meaning of Federal Rules of Civil Procedure, rule 60(a), 28 U. S. C. A., following section 723c, which, thereunder, may be corrected at any time. It would be mere form for us to remand the case so that the amendment might be made, and therefore we shall consider the order as amended.

> Compare: Norton *v.* Larney, 266 U. S. 511, 516, 45 Sup. Ct. 145, 69 L. Ed. 413; Realty Holding Co. *v.* Donaldson, 268 U. S. 398, 400, 45 Sup. Ct. 521, 69 L. Ed. 1014."

It is, of course, clear that the *Crosby* case did not arise on a motion to dismiss the complaint, but, on the question of the regularity of the appeal, that distinction, we submit, is unimportant. The rules of Civil Practice make no distinction between types of involuntary dismissal. Rule 41(b), Rule 58, and Rule 73(a) and (b).

In the *Crosby* case, what was appealed from was an *order.* There was no judgment following the order. The order was treated as being the final judgment. Furthermore, there had been: (1) no motion to dismiss the petition and (2) no determination of the court that it should be dismissed, and (3) no order made granting the motion for its dismissal, and (4) no statement that "the petition is dismissed" either in the opinion as here, or in any order, and (5) not even a notice of appeal from any such non-existent order. Yet the Court held that the appeal was properly before it, as if on an appeal from an order of dismissal. This Court regarded the *intent* as the dominating consideration. It said: "However, the intent to dismiss is clear." This Court gave weight to the substance of the situation, not to mere useless words or forms or shadow-boxing.

From this analysis of the cases in this Court, it appears to be finally established by the *Crosby* case that an appeal can properly be taken from an order dismissing a complaint. The *Crosby* case is in accordance with the Court's decision in *Johnson* v. *Horton, supra,* and in *Hicks* v. *Bekins, etc., supra.* The expression in the *Monarch Brewing Company* case and in *Wright* v. *Gibson,* based on the old *San Francisco* case, must, we submit, be limited to the facts in those cases.

See also, *Bensen* v. *U. S.,* 93 F. (2d) 749 (C. C. A. 9th, 1937).

B.

The Decisions in the Other Circuits.

The decision of this Court in the *Crosby* case is in accord with the rule laid down in the other circuits, as follows:

1. *In the First Circuit. Sosa* v. *The Royal Bank of Canada,* 134 F. (2d) 955 (1943).

2. *In the Second Circuit.* In *Musher Foundation* v. *Arbitrating Company,* 127 F. (2d) 9 (C. C. A. 2d, 1942). *Zalkind* v. *Scheinman,* 139 F. (2d) 895 (1943); *Clarke* v. *Chase Bank,* 137 F. (2d) 797 (1943); *Collins* v. *Metro-Goldwyn Corp.,* 106 F. (2d) 83 (1939). *Zadig* v. *Aetna Ins. Co.,* 42 F. (2d) 142 (1930).

3. *In the Third Circuit. Baird* v. *Peoples Bank,* 120 F. (2d) 1001 (1941).

4. *In the Fourth Circuit. Bailey* v. *Crump,* 41 F. (2d) 733 (1930).

5. *In the Fifth Circuit. Martin* v. *Casualty Insurance Company,* 138 F. (2d) 896 (1943).

6. *In the Sixth Circuit. Atwood* v. *National Bank of Lima,* 115 F. (2d) 861 (C. C. A. 6, 1940).

7. *In the Seventh Circuit. Karl Kiefer Manufacturing Company* v. *U. S. Bottlers Machinery Company,* 108 F. (2d) 469 (C. C. A. 7th, 1939). Also, *Jefferson Electric Co.* v. *Sola Co.,* 122 F. (2d) 124 (1941).

8. *In the Eighth Circuit. Iowa-Nebraska Light Company* v. *Daniels,* 63 F. (2d) 322 (C. C. A. 8th, 1933), *semble.*

9. *In the Ninth Circuit.* This circuit—*Johnson* v. *Horton,* 63 F. (2d) 950 (1933); *Hicks* v. *Bekins,* 115 F. (2d) 406 (1940); *Crosby* v. *Pacific Lines,* 133 F. (2d) 470 (1943).

10. *In the Tenth Circuit. Western Union Telegraph Co.* v. *Dismang,* 106 F. (2d) 362 (C. C. A. 10th, 1939).

11. *In the District of Columbia. Vietti* v. *Wayne,* 136 F. (2d) 771 (U. S. Court of Appeals for the District of Columbia, 1943). *Safeway Stores* v. *Coe,* 136 F. (2d) 771 (1943).

In 10 Cyc. of Federal Procedure, 2d Edition, page 262, it is stated that "The general rule is that an order dismissing the complaint is a final and appealable decree, though it may leave the merits undetermined and may not be a bar to another action".

* * *

In addition to the cases in this Court, upon which the Reserve Bank relies in support of its motion, it cites, at page 2 of its Memorandum of Points and Authorities, four cases in other jurisdictions.

These cases are, we submit, not in point. *Schendel* v. *McGee,* 300 Fed. 273 (C. C. A. 8th, 1924), merely held that an order of the Court dismissing the case from the calendar and striking it from the docket was not an appealable order, and consequently the appropriate remedy for the plaintiff was a mandamus to have the case restored to the calendar, which mandamus was granted. See *Zadig* v. *Aetna Ins. Co., supra,* to the contra.

Amsinck & Co. v. *Springfield Grocer Company,* 7 F. (2d) 855 (C. C. A. 8th, 1925), held that the Court was not barred from reopening the case to receive new evidence in view of the passing of the term, inasmuch as, in the view of the Court, the memorandum opinion of the District Court which ended with the words "Judgment accordingly" had not been followed by any order of the Court or by any judgment thereon, although the same was copied into the record containing judgments.

In *Dyar* v. *McCandless,* 33 F. (2d) 578 (C. C. A. 8th, 1929), the appeal was taken from an order striking out an answer but the order gave the defendant leave to amend. The opinion contains a dictum to the effect that an order granting a motion to dismiss a complaint, without entry of judgment, is not a final order. But the case itself does not

stand for that proposition and it was decided under the old rules.

In *Leonard* v. *Socony Vacuum Oil Company,* 130 F. (2d) 535 (C. C. A. 7th, 1942), it was held that a partial summary judgment for the defendant was not appealable, the Court saying "Despite such interlocutory orders, the suit or action is regarded as still pending and before the Court for final determination by final judgment before jurisdiction can be conferred upon this Court to review * * *".

POINT VI.

If the "Order on Motions" of November 17, 1944 should be deemed to be the order appealed from, it is not important that the order does not contain the words "the complaint is dismissed", particularly since the opinion of the District Court contains that very determination and directs that the order shall be in accordance therewith.

In the *Crosby* case, 133 F. (2d) 470, *supra,* there was merely a "recommendation" of the Special Master, that the petition be dismissed. No motion had been made in the District Court to dismiss the petition, no opinion to the effect that it should be dismissed had been rendered, no order granting any motion to dismiss had been made, and no order or judgment had been made dismissing the petition and no appeal from any such order had been taken. Nevertheless, *and this is the crucial fact,* as this Court said "However, the intent to dismiss is clear". In the instant case, the matter was before the District Court on a motion to dismiss the complaint. The opinion of the Court not only stated that "the motions to dismiss filed by each of the defendants will be granted" but actually stated in the present tense that "Therefore, this complaint is dismissed as to all defendants * * *" (R., p. 165) and the Court directed that "an order will be entered in accordance with this opinion." An actual order was so entered, except that it failed to be in accordance with the opinion in that it failed

to contain the words "and the complaint is dismissed". The notice of appeal of the Peoples Bank nevertheless stated that an appeal was taken from that part of the order which "dismisses said action as against said defendant" (R., p. 166).

Can anyone doubt that the complaint which had already been categorically dismissed by the order in the Opinion was also quite thoroughly dismissed by the "Order on Motions". To use the language of this Court in the *Crosby* case "the intent to dismiss is clear". Surely, nothing can turn on the fact that the Order on Motions was not in conformity with the direction of the Opinion, and consequently does not contain the words "and the complaint is hereby dismissed". Those words, in reality, add nothing to the words "the motions to dismiss * * * are therefore granted". What is it that is granted? The dismissal of the complaint. The addition of the words "and the complaint is dismissed" would be mere superfluous repetition. We cannot believe that in this enlightened age and under the liberal rules now in force, and in view of the non-technical approach to such matters which this Court has adopted in the *Crosby* and other cases, the failure of the Order on Motions of the District Court to comply with the Opinion of that Court by the addition of the repetitious words "the complaint is dismissed" will be treated as of any consequence whatsoever.

As above stated, we do not deem the addition of these words as adding anything to the Order on Motions or as in any way necessary in view of the order in the Opinion which actually dismisses the complaint. We do not believe that the addition of these words would make the Order on Motions any more final and effective in dismissing the complaint than that order already is, if, in view of the rules, that should be deemed the order in the case. But purely out of superabundant caution and in view of the hyper-technical attitude of the Reserve Bank in this situation, we applied to the District Court for an order under Rule 60A directing what seemed to be the purely ministerial act of bringing the Order on Motions of November 17th, 1944 into

"accordance" with the opinion by adding the words copied from the opinion, "and the complaint is dismissed".

We believe that, *as a matter of course,* the District Court should have granted the motion of the plaintiff Peoples Bank, made on April 26, 1945, to correct the Order on Motions, because of an error arising from a plain clerical "oversight or omission" (Rule 60A). In our judgment, there could scarcely be a plainer case for the correction of an obvious error of omission. We are unable to understand why the District Court refused to make the correction. The opinion of the Court stated in so many words that "the complaint *is* dismissed." It said that an order would be entered "in accordance with this opinion". The order entered was not in strict literal accordance with the opinion.

Under the decision of the Court in the *Crosby* case, the Order on Motions should have been amended as a matter of course, *and following its procedure in that case, this Court will, we believe, if it deems the omission as of any substance, treat the order of November 17, 1944, as if, in fact, the obvious clerical omission had been corrected.* The amendment which in the *Crosby* case this Court treated as having been made by the District Court in order to technically regularize the appeal, was of far greater magnitude than would be involved in the addition in the instant case to the Order on Motions of the repetitious words "and the complaint is dismissed".

In *Johnson* v. *Wilson,* 118 F. (2d) 557 (C. C. A. 9th, 1941) *supra* the appellee made a motion to dismiss the appeal because in the record on appeal the only notice of appeal from a judgment of May 10, 1931, was a notice of June 6th, 1940. Nevertheless, there had been in fact an earlier and timely notice of appeal. The Court said (118 F. (2d) 557, at 558):

> "Quite likely the reason for this omission is because the record was not finally agreed upon by the parties until June 6, 1940—that is after an elapse of time in excess of that allowable by the district judge for the filing here of the transcript of the record on the earlier notice of appeal.

> "However, since this court has the power to consider the appeal though the filing of the record came after the time allowable by the district court, (*Ainsworth* v. *Gill Glass & Fixture Co.*, 3 Cir., 104 F. 2d 83, 84), the clerk should have included the notice of appeal of December 19, 1939, and left to our discretion the disposition of the appeal. Since the record presents a strongly arguable claim of error and the delay is not shown to have prejudiced the appellee, we consider the appeal of December 19, 1939, on the judgment of May 10, 1939. The motion to dismiss the appeal is denied."

See *Odell* v. *Batterman & Co.*, 223 Fed. 292, 295 (C. C. A. 2nd, 1915).

Courts no longer take a formalistic view with respect to appeals. The substance is dealt with.

The clear purpose of this Court, as evidenced in the *Crosby* case, and in *Johnson* v. *Wilson, supra,* not to permit an appellant to lose his appeal on unsubstantial grounds, where the reality of a final decision exists, and the intent to appeal therefrom is clear, and there is an adequate record before the Court and the appellee is adequately notified thereof, is in accordance with the attitude uniformly adopted by other Circuit Courts of Appeal in parallel situations.

In *Crump* v. *Hill,* 104 F. (2d) 36 (C. C. A. 5th, 1939), no notice of appeal of any kind was filed. The rules were not complied with in any respect. A totally novel procedure was adopted, to wit, a waiver of the notice of appeal signed by appellant and appellee and cooperation by both of them in the preparation of the record. The rules have no provision of any kind for waiver of notice of appeal, and yet the propriety of the appeal was sustained.

The Court said (104 F. (2d) 36, at 38):

> "* * * It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure

required by the Rule itself is a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.

"If the appellant had not by filing his notice of appeal in February, when too late to be effective, called attention to the technical point now urged, we think it would hardly have occurred to appellee or to anyone else that what appellee and appellant did to perfect the appeal had not been effective to do so. The ill-advised late filing of that notice can have no effect upon the jurisdiction of this Court already established by the prior proceedings. It must be disregarded, as surplusage, its filing as a superfluous act.

"Long before its filing and well within the time fixed by the Rules, appellant, in complete accordance with their spirit and in substantial accordance with their letter, had filed with the Clerk a complete equivalent of a notice of appeal, appellee's waiver of service of such notice and of designation of record contents, and her appearance to the appeal. By Rule 1 it is provided that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action, and by Rule 61 that the Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

"We think that it was substantial compliance with the letter of Rule 73 to file, instead of the notice of appeal, the waiver of service thereof and appearance thereto, but if this ruling does violate its letter, it certainly accords with and gives effect to its substance and spirit. Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee's motion seeks."

In the instant case, instead of a waiver of notice, notices of appeal were given by both appellant and appellees from the "order of November 17, 1944" (a fact certainly of equal weight with a waiver), and we have a cooperation in preparation of the record on appeal similar to that in the *Crump* case.

Another strong case is *Milton* v. *United States,* 120 F. (2d) 794, *supra,* in which the appeal was taken from a non-

appealable order and there was no appealable order in existence.

See also, *Safeway Stores* v. *Coe,* 136 F. (2d) 711, *supra, U. S.* v. *Ellicott,* 223 U. S. 524, *supra, Shannon* v. *Retail Clerks, etc.,* 128 F. (2) 553, *supra.*

In *State of Missouri* v. *Todd,* 122 F. (2d) 804 (C. C. A. 8th, 1941) the appeal was taken from an order denying a petition of State of Missouri for a rehearing on the Commission's petition for review of the bankruptcy referee order allowing petitioner's claim in part. The court held that the order denying appellant's petition for rehearing was not an appealable order but went on to hold that if the appellant had appealed from that order and from the order confirming the order of the referee, a different situation would have been presented. In other words, it held in effect that a mere order confirming an order of the referee allowing a claim was an appealable order although no judgment had been entered for the payment of the money involved.

See also *Charles D. Leffler,* 100 F. (2d) 759 (C. C. A. 3rd, 1938), where the Circuit Court of Appeals sustained the action of the District Court in amending a notice of appeal after appeal had been perfected, by including in the notice of appeal the name of an appellee theretofore omitted therefrom.

In conclusion, the motion to dismiss the appeal should be denied.

Respectfully submitted,

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May 21, 1945.